No. 90-387

In the Supreme Court of the United States

OCTOBER TERM, 1990

LION UNIFORM, INC.,
JANESVILLE APPAREL DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in denying an award of attorney's fees under Section 203(a)(1) of the Equal Access to Justice Act (5 U.S.C. 504(a)(1)), the National Labor Relations Board properly accorded *de novo* review to the determination of an administrative law judge that the position of the Board's General Counsel was not substantially justified.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 905 F.2d 120. The decision and order of the National Labor Relations Board (Pet. App. 12a-60a), including the recommended decision and order of the administrative law judge (Pet. App. 61a-101a), are reported at 285 N.L.R.B. 249. The Board's orders in the underlying unfair practice proceeding are reported at 259 N.L.R.B. 1141 and 247 N.L.R.B. 992.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1990. The petition for a writ of certiorari was filed on September 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactured "fire coats" for firefighters at its plant in Lake City, Tennessee. In the spring of 1977, the Oil, Chemical and Atomic Workers International Union ("the Union") began an organizing campaign at the Lake City plant. The Union won the ensuing Board election held on July 14, 1977, and on October 6, 1977, was certified as the collective bargaining representative of petitioner's production, maintenance and plant clerical employees. 259 N.L.R.B. 1141, 1141-1142 (1982).

On October 12, 1977, the employees went on strike. On October 24, during the strike, petitioner moved the fire coat production line from its Lake City plant to its Beattyville, Kentucky location. 259 N.L.R.B. at 1142. On January 5, 1978, petiioner notified the Union by letter that it had tentatively decided to make the relocation to Beattyville permanent. In that letter it offered to negotiate with the Union over this decision. Petitioner also indicated that it intended to resume production at Lake City with another product line once the strike was over. *Id.* at 1146; Pet. App. 21a-23a.

The Union filed unfair labor practice charges with the Board's Regional Office alleging that petitioner committed numerous violations of Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), during the election campaign, including threats by petitioner's owner and other man-

agement representatives to close the Lake City facility, to discharge the employees, and to cancel the plans for expansion and improvement of the Lake City facility.[1] After the election, the Union filed additional charges alleging that petitioner had unilaterally changed the employees' working conditions in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by its October 24 move of the firemen's clothing line from Lake City to Beattyville, and the subsequent abolition of the employees' jobs in Lake City. 247 N.L.R.B. 992 (1980). The Board's General Counsel issued unfair labor practice complaints on all of these charges and they were consolidated for hearing.

At the outset of the hearing, petitioner offered to admit all the unfair labor practice allegations, including the allegation that the removal of the fire coat line from Lake City was motivated by its union animus, if the Board's order would permit it to reopen its Lake City facility with a product line of knit shirts rather than fire coats. The General Counsel and the Union opposed the settlement, on the basis that only the return of the fire coat line would fully remedy the unfair labor practices committed. 247 N.L.R.B. at 992-993.

The Board, reversing the decision of the administrative law judge (ALJ), refused to accept the settlement. The Board found that the settlement would not restore the *status quo ante* because the seasonal

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[1] Petitioner entered into an informal settlement agreement with the Board's General Counsel resolving these charges but the agreement was set aside after the Union filed additional unfair labor practice charges. 247 N.L.R.B. 992 (1972).

production of knit shirts would not provide the job security produced by the steady demand for fire coats. 247 N.L.R.B. at 993-994.

Thereafter, a hearing was held on the unfair labor practice complaints. The ALJ, whose decision was upheld by the Board with modifications immaterial here, found that during the election campaign petitioner had made numerous threats of retaliation against employees for engaging in union activity, made promises of benefits if employees rejected the Union, and solicited employees to influence other employees to vote against the Union, all in violation of Section 8(a)(1) of the Act. Pet. App. 24a; 259 N.L.R.B. at 1142-1143. The ALJ further found that petitioner had violated Section 8(a)(1) and (5) of the Act by unilaterally informing its employees that work rules would be more strictly enforced and that the employees' privileges of placing food and drink orders through outside restaurants were rescinded, at a time when the Union was the employees' collective bargaining representative. Pet. App. 24a; 259 N.L.R.B. at 1144.

However, the ALJ concluded that petitioner had not violated Section 8(a)(3) or (5) of the Act when it moved the fire coat line from Lake City on October 24, 1977. The ALJ found that petitioner had proven that the move was temporary, was precipitated by the strike and was economically motivated.[2] Pet. App. 24a; 249 N.L.R.B. at 1145-1146. Finally, the ALJ held that petitioner did not violate Section

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[2] In reaching this conclusion, the ALJ was "bothered by evidence which tends to show that [petitioner] was motivated by its employees' union activities." 259 N.L.R.B. at 1145. The ALJ referred specifically to petitioner's owner's threats to employees that petitioner would close the plant and cancel expansion plans because of the employees' union activities. *Ibid.*

8(a)(5) of the Act with regard to its duty to negotiate regarding the return of the fire coat production line to Lake City in January 1978. Pet. App. 24a; 259 N.L.R.B. at 1146-1147.

2. Petitioner filed an application with the Board under the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA), to recover attorney's fees and expenses. The Board referred the application to an ALJ. The ALJ found that petitioner met the eligibility requirements of EAJA (Pet. App. 62a-70a), that the General Counsel was not substantially justified in alleging that petitioner's action in relocating its fire coat line from Lake City to Beattyville was unlawful (*id.* at 72a-78a), that the General Counsel was not substantially justified in refusing a settlement that did not include the return of the fire coat line to Lake City (*id.* at 78a-84a), and that no special circumstances made an award of EAJA fees unjust (*id.* at 84a-88a). He recommended that petitioner be awarded fees and expenses—totalling $90,564.65—incurred in the underlying unfair labor practice proceeding and in the EAJA proceeding. Pet. App. 92a, 100a.

The Board, Chairman Dotson dissenting, reversed the ALJ's award of fees and dismissed petitioner's EAJA application. Pet. App. 39a-40a. Initially, the Board determined that it has jurisdiction to review an ALJ's EAJA decision based on the 1985 amendment to 5 U.S.C. 504(a)(3) providing that it is the *agency* that makes the final decision on EAJA applications. Pet. App. 14a.

The Board then decided that the General Counsel was substantially justified in issuing the complaint concerning the relocation of the fire coat production line and in pursuing that allegation throughout the unfair labor practice proceeding. Pet. App. 20a-21a.

The Board disagreed with the ALJ's finding (*id.* at 73a) that there was "no evidence" that the October 1977 relocation was unlawfully motivated or that petitioner failed to bargain as to this move. *Id.* at 25a, 35a.[3] The Board further held that the General Counsel was substantially justified in rejecting petitioner's settlement offers, which involved less than full reinstatement.[4] *Id.* at 27a. Finally, the Board held that the General Counsel was substantially justified in litigating the case through the close of the hearing and in submitting a posthearing brief to the ALJ. *Id.* at 37a-38a. Although the Board did not find the General Counsel's exceptions persuasive, it concluded that the General Counsel was substantially justified in filing them. *Id.* at 39a.[5]

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[3] The Board noted, *inter alia*, petitioner's pre-election threats to close the plant and cancel the expansion plans, and the timing of the move, 2 weeks after the strike. Moreover, the Board found that "no real evidence had been presented by [petitioner] to counter balance the apparent discriminatory motive for the move." Pet. App. 25a-26a.

[4] The Board noted that the Board had rejected the unilateral settlement proposal and that the earlier settlement of Section 8(a)(1) conduct had been withdrawn by the Regional Director. Pet. App. 29a.

[5] The Board relied on the ALJ's findings of petitioner's union animus and on petitioner's contradictory statements respecting its intentions concerning the Lake City and Beattyville locations. Pet. App. 38a-39a.

The Board agreed with the ALJ that the General Counsel was not substantially justified in including an allegation that petitioner violated Section 8(a)(5) of the Act by its action on January 5, 1978, in tenatively making the move permanent. However, it found that an award for EAJA fees was not warranted because this allegation was not a "significant and discrete" substantive part of the proceeding. Pet. App. 36a-37a.

3. The court of appeals affirmed the Board's order denying EAJA fees and expenses. Pet. App. 11a.

The court first concluded that the Board had properly applied a *de novo* standard of review to the ALJ's decision. The court rejected petitioner's contention that this case is controlled by *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and that therefore the Board is required to use a deferential abuse of discretion standard when reviewing an ALJ's EAJA decision. As the court explained, "[u]nlike an appellate court, the Board's normal function requires it to examine the complete record of a proceeding and make *de novo* findings." Pet. App. 7a. The court added that an abuse of discretion standard for Board review of ALJ EAJA determinations would be incompatible with the subsequent substantial evidence standard of review of Board determinations by the reviewing court: "[W]here the EAJA litigation begins before an agency, with appeals contemplated to the courts, a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense. In the absence of more specific legislative direction, we must assume that the more logical scheme applies—that the standard of deference is heightened as the appeal process progresses—*de novo* review at the agency level, and substantial evidence review before the courts." *Id.* at 8a-9a.

The court then found that there was substantial evidence to support the Board's conclusion that the General Counsel's prosecution of the relocation allegation and its refusal to accept petitioner's settlement proposals were substantially justified. Pet. App. 9a-11a.

ARGUMENT

The decision of the court of appeals is correct. Because, as petitioner concedes, this "is the first case to address" the issue posed (Pet. 16), it does not conflict with the decision of any other court. Further review is therefore not warranted.

1. Section 203(a)(1) of EAJA, 5 U.S.C. 504 (a)(1), provides for an award of attorney's fees to a party prevailing in an "adversary adjudication" before an agency, unless it is shown that the government's position was "substantially justified" or that special circumstances make an award unjust. That Section further provides that the "adjudicative officer of the agency" shall determine whether the position of the agency was substantially justified or there were special circumstances.[6] Relying on the language "adjudicative officer," which is defined as the "deciding official * * * who presided at the adversary adjudication" (5 U.S.C. 504(b)(1)(D)), petitioner contends (Pet. 9-10) that EAJA precludes *de novo* review by the Board of the ALJ's determination on the issue of substantial justification. However, the last sentence of EAJA, 5 U.S.C. 504(a)(3), which was added in 1985, makes clear that, notwithstanding the role of the adjudicative officer, "[t]he decision of the *agency* on the application for fees and other expenses shall be the final administrative decision under this section" (emphasis added). And, as we show below, the history of this amendment establishes that Congress, in providing for agency review of adjudicative officers' EAJA determinations, con-

[6] The adjudicative officer also is empowered to determine whether a fee award may be denied or reduced because the party has unduly or unreasonably protracted the proceeding. 5 U.S.C. 504(a)(3).

templated that the agency would apply the same standard of review that it applied in adjudications under the Administrative Procedure Act (APA), 5 U.S.C. 551.[7]

a. EAJA, as it was first enacted in 1980, made no reference to agency review of adjudicative officers' decisions.[8] The draft model rules prepared by the Administrative Conference of the United States (ACUS) to assist the agencies in formulating rules[9] provided, in pertinent part (Sec. 0.409(b)), that the adjudicative officer's decision was reviewable by the agency under the standard "ordinarily applied to [recommended or] initial decisions, except that an adjudicative officer's determination" on the issues whether the agency's position was substantially justified or special circumstances make an award unjust "will be reversible only for abuse of discretion." 46 Fed. Reg. 15,895, 15,905 (1981); see also *id.* at 15,900-15,901.

After comment from several agencies, including the Board, the ACUS revised the pertinent rule (Sec. 0.308) to omit any special standard for agency re-

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[7] The APA provides, 5 U.S.C. 557(b), that "on appeal from or review of the initial decision [of the presiding employee], the agency has all the powers which it would have in making the initial decision * * *."

[8] The only reference to the adjudicative officer's decision, other than those previously noted, states that the decision "shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor." 5 U.S.C. 504 (a)(3).

[9] Administrative agencies are required by EAJA to "establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses" through the adoption of rules. 5 U.S.C. 504(c)(1).

view of an adjudicative officer's determinations. 46 Fed. Reg. 32,912, 32,915 (1981). The ACUS explained that it agreed "with those agencies that believe that the standard of review" in the Administrative Procedure Act, 5 U.S.C. 557, "applies to decisions on applications for attorney fees." While acknowledging that EAJA could be interpreted to permit an "abuse of discretion" standard for review of an adjudicative officer's decision on the issues of substantial justification or special circumstances, the ACUS found "no clear indication that Congress intended to adopt such an unusual and potentially impractical procedure." Instead, "we believe that Congress mentioned the adjudicative officer to insure that the initial ruling on an application would be made by someone with direct knowledge of the underlying proceeding." The ACUS concluded that, "[i]f Congress meant to depart so substantially from customary agency practice in adjudications under the Administrative Procedure Act, we believe it would have done so explicitly." 46 Fed. Reg. 32,900, 32,910 (1981).

Thereafter, the Board published its own EAJA rules based upon the ACUS model rules. 29 C.F.R. 102.143 *et seq.* The Board's rules provide that the rules governing EAJA cases will be patterned after the rules covering the Board's unfair labor practice cases. 29 C.F.R. 102.154. In unfair labor practice cases, the Board, while giving deference to the ALJ's credibility findings, gives the ALJ's other findings *de novo review. Standard Drywall Products, Inc.*, 91 N.L.R.B. 544, 545 (1950); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-496 (1951).

b. In 1984, Congress passed H.R. 5479 (98th Cong., 2d Sess.), which would have extended, made permanent, and amended EAJA, but it was vetoed

by the President. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 6 (1985). H.R. 5479 would have added a final sentence to Section 504(a)(1) making explicit that "[t]he decision of the adjudicative officer on the application for fees and other expenses shall be the final administrative decision under this section." H.R. Rep. No. 992, 98th Cong., 2d Sess. 20 (1984); and see *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 139 (1984). The House Report on H.R. 5479 explained that "[t]here is a potential conflict of interest when an agency is asked to review the propriety of its own actions particularly when an award may be taken from its own budget. This distinguishing feature, in the Committee's view, justifies a departure from the Administrative Procedure Act." H.R. Rep. No. 992, *supra*, at 9. This provision would have reversed the prior ACUS interpretation that the adjudicative officer's EAJA determinations were reviewable by the agency under the customary APA standard of review, and would have made such determinations directly reviewable in the courts.

However, H.R. 5479 did not become law, and, when EAJA was amended the following year, the ACUS view was specifically adopted by Congress. The bill (H.R. 2223) that was introduced in the 99th Congress to address the concerns of the Administration in vetoing the earlier bill added, as a "clarifying amendment," the following final sentence to Section 504(a)(3), which was ultimately enacted: "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." See

Equal Access to Justice Act Amendments: Hearings on H.R. 2223[10] *Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 3 (1985) [hereinafter *Hearings on H.R. 2223*].

Contrary to petitioner's contention (Pet. 14-15), the legislative history makes clear that this amendment was addressed not only to whether the agency had authority to review the decision of the adjudicative officer, but also to the agency's standard for review of that decision. The issue as framed in the hearings was whether a standard other than the normal APA standard of review should apply to agency review of Administrative Law Judges' EAJA fee determinations. Both the Administration and the Chairman of the ACUS took the position that the normal APA standard of review should apply. Thus, in supporting the new clarifying amendment, Carolyn Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice, testified that there "was no reason to single out this area for different treatment [than other decisions by administrative law judges subject to agency review]." *Hearings on H.R. 2223*, *supra*, at 15.

Similarly, in a letter to the subcommittee, Loren Smith, Chairman of the ACUS, wrote that "[e]limination of agency review of adjudicative officers' decisions represents a significant departure from the orderly patterns of agency decisionmaking reflected in the Administrative Procedure Act." *Hearings on H.R. 2223*, *supra*, at 73. Chairman Smith described that decisionmaking in the following terms (*ibid.*):

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[10] H.R. 2223 was a forerunner of H.R. 2378, 99th Cong., 1st Sess. (1985), which was enacted into law. See H.R. Rep. No. 120, *supra*, at 6.

> Under the APA, it is the responsibility of Presidentially-appointed, politically accountable agency heads to make important decisions, in most adjudications as well as in other matters. The role of the administrative law judge is to prepare an initial or recommended decision so that the agency will have the benefit of the views of the person who actually heard the evidence. The agency is generally free to reach different conclusions as to either the facts or the law of the case, bringing the expertise and judgment of the agency head (or members) to bear on the record. In addition to assigning the ultimate responsibility for agency decisions where it belongs, with senior appointed officials, agency review provides a crucially important opportunity to ensure consistency in administrative decisions and correct legal and technical errors.

Chairman Smith added (*id.* at 74) that:

> elimination of agency review would produce the anomalous result that an adjudicative officer who does not have the final say on substantive issues in the case will nevertheless have the final say on whether the position of the agency as litigator in that case was substantially justified. An ALJ whose decision has been reversed or substantially modified may have great difficulty in reaching a correct decision on substantial justification based on the agency head's ruling in the case. Consider, for example, the likelihood that an adjudicative officer who found in favor of the agency but was reversed on review will determine that the agency's position was not substantially justified. To do so, the officer would have to cast his or her own initial decision in the case in a very negative light.

Explaining the basis for the amendment to Section 504(a)(3), the House Report on H.R. 2378 stated that the amendment "follows the view adopted by the Administrative Conference." H.R. Rep. No. 120, *supra*, at 14. This statement, read in the light of the foregoing history, makes plain that Congress intended that agencies could review the EAJA determinations of adjudicative officers and that, in doing so, they would apply the normal APA standard of review.[11]

2. Petitioner's reliance (Pet. 10-11) on *Pierce* v. *Underwood*, *supra*, is misplaced. In *Pierce*, this Court held that under 28 U.S.C. 2412(d)—the EAJA section providing for attorney's fees to prevailing litigants in court proceedings—the court of appeals correctly applied an abuse of discretion, rather than a *de novo*, standard of review to the district court's determination that the government was not substantially justified in that case. 487 U.S. at 563. Petitioner argues that the parallel between Section 2412 and Section 504 suggests that the Board must apply an abuse of discretion standard to the ALJ's determination of substantial justification. There is no merit to that contention.

As the court of appeals correctly noted (Pet. App. 7a), "[t]he relationship between a court of appeals and a district court differs substantially from the one existing between an A.L.J. and the Board." Thus, the Board, operating under the APA reviewing standard, normally is free to make *de novo* find-

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[11] Petitioner's reliance (Pet. 10) on Congressman Railback's 1980 expression of preference for ALJ responsibility for determining EAJA awards simply ignores the subsequent clarifying amendment in 1985, which makes explicit that that view was not adopted by Congress.

ings. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492 (1951), and Administrative Procedure Act, 5 U.S.C. 557. No similar considerations applied to the normal reviewing authority of the court of appeals on the issue presented in *Pierce* (see 487 U.S. at 558).

Moreover, if any parallel can be drawn between the situation in *Pierce* and the situation here, it is the district court and the Board that are analogous, not the district court and the administrative law judge. As the Court noted in *Pierce* (487 U.S. at 559), 5 U.S.C. 504(c)(2) "specifies that the *agency's* decision [as to substantial justification] may be reversed only if a reviewing court 'finds that the failure to make an award * * * was unsupported by substantial evidence' " (emphasis added).[12] The Court relied on that provision in support of its conclusion that courts of appeals should give deferential review to decisions of district courts, expressing "doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court." *Ibid.* Similarly, here, as the court of appeals correctly noted (Pet. App. 8a), petitioner's position "makes little sense," because it would result in the Board's according more deference to the ALJs determination than the court of appeals would accord to the Board's final decision.

Petitioner acknowledges (Pet. 13) that *de novo* review before the agency followed by substantial evi-

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[12] This provision was added in 1985. Previously, there was only a discretionary right of review in the court of appeals under an abuse of discretion standard. See H.R. Rep. 120, *supra*, at 16, 24-25.

dence review by the courts may be " 'more logical' " and "is the typical pattern." Nevertheless, petitioner argues, Congress was free not to make that "choice." That is true. But, as shown above, petitioner's argument that Congress in fact did not make the more logical and traditional choice simply ignores the effect of the 1985 amendments to EAJA.[13]

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[13] Petitioner's reliance (Pet. 10) on the congressional concern that in an EAJA case an agency should not pass judgment on whether its own action has been proper has little relevance for Board proceedings. Under Section 3(d) of the NLRA, 29 U.S.C. 153(d), the General Counsel is an independent prosecutor, whose determination to issue a complaint is not subject to review, either by the Board or by the courts. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). The Board is the adjudicatory branch of the Agency, which is the ultimate arbiter of the merits of the complaint issued by the General Counsel. The EAJA case arises only after the Board has ruled in favor of the applicant on the merits of the unfair labor practice complaint. In that context, the Board does not review its own actions; rather it must assess the reasonableness of the actions of the separate and independent General Counsel. Moreover, as the Chairman of ACUS pointed out, p. 13, *supra*, in any case where the Board has overturned the ALJ's finding of a violation, it is the ALJ, not the Board, who would necessarily engage in self-judgment in passing on a subsequent EAJA application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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